

## **FAX FROM ALLEN L. MORGAN**

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**TO: BREWSTER KAHLE**

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### **MESSAGE**

**BREWSTER:**

**PER OUR PHONE CONVERSATION OF A FEW MINUTES AGO.  
TALK TO YOU IN THE MORNING.**

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**THIS FAX CONSISTS OF 6 PAGES  
INCLUDING THE COVER PAGE**

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(i)(h) any payment or discharge of a material lien or liability thereof, which lien or liability was not either (i) shown on the balance sheet as the Balance Sheet Date included in the WAIS Financial Statements; (ii) discharged in accordance with the terms of any contractual obligations existing on the date hereof and disclosed to AOL on the WAIS Schedules; or (iii) incurred in the ordinary course of business after the Balance Sheet Date; or

(i)(i) any obligation or material liability incurred by WAIS to any of its officers, directors or shareholders, or any loans or advances made to any of its officers, directors or shareholders except normal compensation, commissions, bonuses and expense allowances payable to officers consistent with past practice or consistent with WAIS contractual obligations elsewhere described in the WAIS Schedules.

*Balance Sheet Date*

Since December 31, 1994, WAIS has not entered into any Government Contracts (as defined in Section 2.22 hereof) and has submitted no invoice or other claim for payment in connection with any Government Contract.

2.11 Agreements and Commitments. Except as set forth in Section 2.11 to the WAIS Schedules or as listed in Section 2.12, Section 2.15.3 or Section 2.15.6, respectively, to the WAIS Schedules, as required by Section 2.12, Section 2.15.3 or Section 2.15.6, as the case may be, WAIS is not a party or subject to any oral or written executory agreement, obligation or commitment which is described below:

(a) (i) Contract, commitment, letter contract or purchase order providing for payments by WAIS in an amount of (1) \$35,000 or more in the ordinary course of business to any one vendor; or (2) \$20,000 or more not in the ordinary course of business to any one vendor; or (ii) quotation, bid or proposal providing for payments by WAIS in an amount of (1) \$35,000 or more in the ordinary course of business to any one vendor; or (2) \$20,000 or more not in the ordinary course of business;

(b) License agreement as licensor or licensee (except in cases where WAIS is a licensor or a licensee for standard (except for immaterial deviations) non-exclusive software licenses granted to end-user customers in the ordinary course of business, the forms of which have been provided or made available to AOL), but in all events including site licenses for products and each agreement that provides for either the delivery of source code to the licensee or escrow of such source code for the benefit of such licensee;

(c) Agreement by WAIS to encumber, transfer or sell rights in or with respect to any WAIS Intellectual Property (as defined in Section 2.12 hereof) (except in cases where WAIS is a licensor for standard (except for immaterial deviations) non-exclusive software licenses granted to end-user customers in the ordinary course of business, the forms of which have been provided or made available to AOL's counsel);

(d) Agreement for the sale or lease of real or tangible personal property involving more than \$25,000 per year;

9.1.2 Unless otherwise specifically provided herein or agreed by the parties hereto, this Agreement will be terminated if all conditions to the Closing have not been or cannot reasonably be satisfied or waived on or before May \_\_, 1995 unless the Closing has been extended by the parties.

9.2 At the Closing. At the Closing, this Agreement may be terminated and abandoned:

9.2.1 By AOL if any of the conditions precedent to AOL's and Sub's obligations set forth in Section 8 above have not been fulfilled or waived at and as of the Closing; or

9.2.2 By WAIS if any of the conditions precedent to WAIS's obligations set forth in Section 7 above have not been fulfilled or waived at and as of the Closing.

Any termination of this Agreement under this Section 9.2 will (i) be effective upon the delivery of notice of the terminating party to the other party hereto, except as provided below and (ii) will not result in liability for either party to the other.

9.3 No-Shop Provision; Break Up Fee. WAIS agrees that, from the date hereof until the Closing Date or ~~the earlier mutual abandonment of the transactions contemplated by this Agreement~~ (the "No-Shop Period"), WAIS and Mr. Brewster Kahle will not, and will not authorize any officer or director of WAIS or any other person on its behalf to, solicit, encourage, negotiate or accept any offer from any party concerning: (i) the possible disposition of all or any substantial portion of WAIS's business, assets or capital stock by merger, sale or any other means or any other transaction that would involve a change in control of WAIS; or (ii) the sale of any equity or debt securities of WAIS. WAIS will promptly notify AOL in writing of any such inquiries or proposals. If WAIS merges with, or WAIS or its assets are acquired by, a company other than AOL or a wholly-owned subsidiary of AOL during a period of one year after the date hereof March 17, 1995 and if discussions with such company concerning such acquisition occur during the No-Shop Period, WAIS (or the acquiring company) will immediately pay AOL the sum of \$3,000,000 and AOL will make no other claims against WAIS or its shareholders regarding the transactions contemplated by this Agreement. WAIS shall have no obligations under this Section if AOL decides at its sole discretion not to proceed with the transactions contemplated by this Agreement or causes such transactions not to occur (other than as a result of WAIS's breach of this Agreement or intentional failure to cause a condition of Closing to occur).

9.4 Certain Continuing Obligations. Following any termination of this Agreement pursuant to this Section 9, the parties hereto will continue to perform their respective obligations under Section 9.3 and Section 11 but will not be required to continue to perform their other covenants under this Agreement.

## 10. SURVIVAL OF REPRESENTATIONS, INDEMNIFICATION AND REMEDIES

10.1 Survival of Representations. All representations, warranties and covenants of WAIS contained in this Agreement will remain operative and in full force and effect, regardless of any investigation made by or on behalf of the parties to this Agreement, until the earlier of the termination of this Agreement in accordance with its terms or the Final Release Date (as defined

was materially false when made

due to

in the Escrow Agreement), whereupon such representations, warranties and covenants will expire; provided that the representations and warranties contained in the following Sections 2.8, 2.12, 2.14, 2.22, 2.23, and 2.24, to the extent the same apply to conditions existing on or before the Closing Date (the "Specific Representations"), shall remain operative and in full force and effect until the first anniversary of the Closing Date: (i) Section 2.8 (Taxes), to the extent such representation and warranty may apply to the knowledge of, or to the intentional, knowing or willful action or inaction of, WAIS and/or Mr. Kahle; (ii) Section 2.12 (Intellectual Property) to the extent such representation and warranty may apply (A) to the knowledge of, or to the intentional, knowing or willful action or inaction of, WAIS or Mr. Kahle, and/or (B) to any claim or potential claim of Thinking Machines Corporation and/or its trustees or administrators, successors or assigns ("TMC Claims"); and (iii) Section 2.14 (Certain Transactions and Agreements), to the extent such representation and warranty may apply to the knowledge of, or to the intentional, knowing or willful action or inaction of, WAIS and/or Mr. Kahle (collectively, the "Specific Representations"). AOL's and Sub's representations, warranties and covenants contained in this Agreement shall terminate as of the earlier of the termination of this Agreement in accordance with its terms or the Final Release Date.

and

**10.2 Indemnity and Escrow Agreement.** Subject to the limitations set forth in this Section 10, the WAIS Shareholders will indemnify and hold harmless AOL, Sub and its respective officers, directors, agents and employees, and each person, if any, who controls or may control AOL or Sub within the meaning of the Securities Act (hereinafter referred to individually as an "Indemnified Person" and collectively as "Indemnified Persons") from and against any and all losses, costs, damages, liabilities and expenses arising from claims, demands, actions, causes of actions, including, without limitation, reasonable legal fees, net of any recoveries under applicable insurance policies, or indemnities from third parties or tax benefits to AOL resulting from such damage and known to AOL at the time of making a claim under the Escrow (hereinafter referred to as "Damages") arising out of ~~(i)(a)~~ any misrepresentation or breach of or default in connection with any of the representations, warranties and covenants given or made by WAIS in this Agreement, the WAIS Schedules or any exhibit attached hereto or ~~(i)(b)~~ any claim, demand, action, or cause of action brought within two (2) years after the Closing Date relating to any matter disclosed or required to be disclosed on Section 2.22 to the WAIS Schedules as required by Section 2.22.2(f) hereof (the "Section 2.22.2(f) Matters"); provided that the event underlying such claim, demand, action or cause of action occurred prior to the Closing Date. Notwithstanding anything in this Agreement to the contrary, (i) the Escrow Shares shall be AOL's and Sub's sole recourse for breaches of all representations, warranties, agreements and covenants made by WAIS and/or Mr. Kahle pursuant to this Agreement, other than the Specific Representations and the Section 2.22.2(f) Matters and (ii) the AOL Common Stock and Additional AOL Options issued or granted to Mr. Kahle, and any proceeds thereof, and the Escrow Shares shall be AOL's and Sub's sole recourse for breaches of the Specific Representations and for the Section 2.22.2(f) Matters. Notwithstanding the foregoing, ~~(\*)~~(w) upon the Final Release Date, Mr. Kahle's obligation to indemnify AOL for any claim relating to the Section 2.22.2(f) Matters that is not based on wilful or intentional, knowing or willful action or inaction of WAIS and/or Mr. Kahle shall be limited to an amount not to exceed one hundred fifty percent (100%)(50%) of Three Hundred Twenty-eight Forty-six

and

and after

Options are to secure future service, not to support the indemnity, this was never mentioned

Thousand Dollars (~~\$328,000~~), ~~(y)~~ (\$346,000), ~~(x)~~ Mr. Kahle's obligation to indemnify AOL with respect to any claim relating to Section 2.22.2(f) Matters shall be limited only to such claims arising under those Government Contracts entered into by WAIS prior to the Closing Date, ~~and~~ ~~(z) Mr. Kahle shall have no liability or obligation to indemnify AOL for Section 2.22.2(f) Matter claims to the extent such claims result from AOL's failure to~~ (y) AOL shall use commercially reasonable efforts to mitigate liability to WAIS and/or Mr. Kahle resulting from WAIS's failure before the Closing to properly legend WAIS's software upon delivery to the U.S. Government and (z) with respect to any TMC Claim that is not based on intentional, knowing or willful action or inaction of WAIS and/or Mr. Kahle, AOL shall be responsible for the defense thereof (with the reasonable cooperation of WAIS and Mr. Kahle); provided that all legal fees and expenses in connection with such defense shall be included as Damages hereunder, and provided, further that AOL may not enter into any settlement of any TMC Claim indemnified by Mr. Kahle hereunder without the prior written consent of Mr. Kahle, such consent not to be unreasonably withheld or delayed. The indemnification provided for in this Section 10.2 shall not apply unless and until the aggregate Damages for which one or more Indemnified Persons seeks indemnification under this Section, exclusive of legal fees, exceeds \$25,000 (the "Basket"), in which event the indemnification shall include all Damages (including the Basket). AOL will use commercially reasonable efforts to obtain recoveries under all applicable insurance policies for all Damages.

## 11. MISCELLANEOUS

11.1 Governing Law. The internal laws of the State of California (irrespective of its choice of law principles) will govern the validity of this Agreement, the construction of its terms, and the interpretation and enforcement of the rights and duties of the parties hereto. Any litigation or other dispute resolution between the parties relating to this Agreement will take place in any court of competent jurisdiction.

11.2 Assignment: Binding Upon Successors and Assigns. Neither party hereto may assign any of its rights or obligations hereunder without the prior written consent of the other party hereto. This Agreement will be binding upon and inure to the benefit of the parties hereto and their respective successors and permitted assigns.

11.3 Severability. If any provision of this Agreement, or the application thereof, is for any reason held to any extent to be invalid or unenforceable, the remainder of this Agreement and application of such provision to other persons or circumstances will be interpreted so as reasonably to effect the intent of the parties hereto.

11.4 Counterparts. This Agreement may be executed in any number of counterparts, each of which will be an original as regards any party whose signature appears thereon and all of which together will constitute one and the same instrument. This Agreement will become binding when one or more counterparts hereof, individually or taken together, will bear the signatures of both parties reflected hereon as signatories. Facsimile copies of such counterparts are acceptable.

the Effective Date (referenced in (i) below in this paragraph) a

employment with AOL and its subsidiaries is terminated without cause by AOL and/or its subsidiaries, then during and with respect to the third year of the period following such termination through and including the expiration of the Non-Compete Period (as hereinafter defined), AOL shall (A) pay or cause to be paid to Participant an amount equal to the same base salary and provide the same benefits, excluding bonuses, as paid and provided to Participant by AOL or its subsidiaries at the time of such termination, on the same terms, including timing of payments and otherwise, as said amounts were paid and benefits provided to Participant during Participant's employment with AOL or its subsidiaries and (B) shall continue the vesting of Participant's stock options on the same basis as such stock options vested while Participant was employed by AOL or its subsidiaries. The foregoing limitation will apply until the earlier of (i) the third anniversary of the Effective Date and (ii) the later of (A) the second anniversary of the Effective Date and (B) the first anniversary of Participant's termination of employment as an employee of AOL and its subsidiaries (the "Non-Compete Period").

if applicable

(b) The foregoing restrictions will not apply to Participant's personal investments in publicly traded corporations regardless of the business they are engaged in, provided that Participant does not at any time own in excess of one percent (1%) of the issued and outstanding stock of any such corporation.

for any portion thereof

2. Other Agreements. Participant represents that Participant has no other agreements or commitments that would hinder the performance of Participant's obligations under this Agreement and Participant will not enter into any such agreements. Participant will indemnify AOL and hold it harmless from any claims, damages, losses and expenses incurred by AOL as a result of any breach of Participant's representations and obligations under this Section 2.

3. AOL Agreements. Participant shall enter into AOL's standard Confidentiality, Non-Competition and Proprietary Rights Agreement, which is attached hereto as Exhibit A; provided that Sections 10, 13 and 14 shall be deleted from such agreement as to Participant.

4. No Obligation to Employ. Nothing in this Agreement shall confer or be deemed to confer on Participant any right to continue in the employ of, or to continue in any other relationship with AOL, Sub or any parent subsidiary or affiliate of AOL or Sub, or limit in any way the right of AOL or Sub or any parent subsidiary or affiliate of AOL or Sub to terminate Participant's employment or other relationship at any time, with or without cause.

5. Remedy. Because Participant's breach of Section 1 of this Agreement will cause AOL irreparable harm for which money is inadequate compensation, AOL will be entitled to immediate injunctive and other preliminary and equitable relief against any material breach or threatened breach of this Agreement, in addition to damages and any other available remedies.

6. Assignment; Successors. Due to the unique nature of the services to be provided hereunder, Participant may not delegate his or her duties under this Agreement. This Agreement is binding upon and inures to the benefit of AOL and Sub and their successors and assigns.

this Agreement shall terminate upon

Notwithstanding anything else to the contrary in this Agreement,

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R=310564.2